

**United States Department of Labor
Employees' Compensation Appeals Board**

CATHERINE C. KEMP, Appellant)

and)

DEPARTMENT OF THE ARMY, ARMY)
RESEARCH LABORATORY, Adelphi, MD,)
Employer)

**Docket No. 03-1123
Issued: September 30, 2004**

Appearances:

Robert J. Kemp, for the appellant
Jim C. Gordon, Jr., for the Director

Oral Argument July 21, 2004

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On March 31, 2003 appellant filed a timely appeal from the January 22, 2003 nonmerit decision of the Office of Workers' Compensation Programs, which denied appellant's request for reconsideration. Appellant also timely appealed the Office's October 1, 2002 merit decision which denied modification of the April 2, 2002 decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues on appeal are: (1) whether appellant established that her claimed seizure disorder is causally related to her December 4, 1984 employment injury; and (2) whether the Office properly denied appellant's request for a review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On December 4, 1984 appellant, then a 21-year-old secretary, sustained a traumatic injury while in the performance of duty. The Office accepted appellant's claim for contusion to the face or scalp from blunt trauma.

On September 30, 1997 appellant filed a notice of recurrence of disability noting that she experienced seizures since the injury of 1984. She submitted an undated report from Dr. Samuel J. Potolicchio, Jr., a Board-certified psychiatrist and neurologist, who noted that appellant underwent a left frontal temporal craniotomy and temporal lobectomy in November 1997, for uncontrolled seizures that were diagnosed as being the result of a head trauma in December 1984.

In a decision dated April 2, 2002, the Office denied appellant's claim on the grounds that the evidence was insufficient to establish that her seizure condition was causally related to employment factors.

On September 13, 2002 appellant requested reconsideration. She submitted various medical records from health care providers who had treated her since her injury in 1984. Reports from Dr. William R. Leahy, Jr., a Board-certified pediatrician, dated 1994 to 1997, detailed a history of appellant's head injury and subsequent treatment. His report of April 11, 1994 noted that appellant had not had a seizure in six months.

Also submitted were reports from Dr. Potolicchio dated 1994 to 2000. His report of July 15, 1997 noted that appellant developed seizures after a minor head trauma at work 12 years ago and experienced her first seizure the night of her injury but did not lose consciousness. In a discharge summary dated July 20, 1997, the physician noted a history of seizure disorder beginning 12 years ago with apparent generalized seizures while sleeping and diagnosed complex partial seizures. Dr. Potolicchio's reports of June 7 and September 3, 2003 noted that the onset of seizures occurred immediately following her head trauma in 1984 and that she experienced no seizure prior to this event. He advised that appellant's condition progressively worsened and she underwent a left craniotomy and temporal lobectomy to surgically remove the seizure focus and recommended medical disability retirement.

In an operative report dated November 21, 1997, Dr. Anthony J. Caputy, a Board-certified neurologist, noted performing a left front temporal craniotomy and resection of anterolateral and medial temporal lobes and diagnosed intractable seizure disorder of the left temporal lobe focus. In a discharge note of January 16, 1998, Dr. Caputy noted that appellant was admitted on November 21, 1997 with a history of intractable seizure disorder for the past 13 years. Appellant associated her condition with a head trauma in 1984, where she struck her head on a shelf however he noted that questions remained as to whether or not the two incidences were related.

In a report dated April 28, 1999, Dr. Peter M. Schissler, a Board-certified internist, noted treating appellant on December 5, 1984 following a work-related head trauma which occurred

December 4, 1984. Also submitted was a report from Dr. Ronald Lesser, a Board-certified internist, dated October 16, 1997, who noted a history of appellant's head injury and diagnosed complex partial seizures. A neuropsychological evaluation dated February 2, 2002 noted that appellant had a mild head injury that resulted in seizures and cognitive decline and concluded that appellant could not maintain competitive employment and recommended medical disability retirement.

In a decision dated October 1, 2002, the Office denied modification of the April 2, 2002 decision.

On October 4, 2002 appellant requested reconsideration. She also submitted a statement dated November 8, 2002 which advised that Dr. Leahy was unable to confirm that her epilepsy was the result of the head trauma in 1984. However, Dr. Potolicchio reported that 15 percent of the damaged tissue on the right rear side of her brain required removal due to the traumatic head injury of December 4, 1984. Appellant advised that she retired on medical disability on July 13, 2002. A December 9, 1995 medical report from Dr. Leahy noted that appellant experienced a seizure several hours after she struck her head while at work; however, the injury was not severe and she did not experience nausea, vomiting or loss of consciousness. He opined that there was a possibility that appellant developed an idiopathic seizure versus post-traumatic seizures.

By decision dated January 22, 2003, the Office denied appellant's reconsideration request on the grounds that her letter neither raised substantive legal questions nor included new and relevant evidence and was, therefore, insufficient to warrant review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

A claimant seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence, including that any specific condition or disability for work for which she claims compensation is causally related to the employment injury.² Causal relationship is a medical question that can generally be resolved only by rationalized medical opinion evidence.³ Where appellant claims that a condition not accepted or approved by the Office was due to her employment injury, she bears the burden of proof to establish that the condition is causally related to the employment injury.⁴ The fact that the etiology of a disease or condition is

¹ 5 U.S.C. § 8101 *et seq.*

² *Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

³ *See Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors must be based on a complete factual and medical background of the claimant. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, in order to be considered rationalized, the opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factors. *Id.*

⁴ *Jacquelyn L. Oliver*, *supra* note 2.

unknown or obscure neither relieves appellant of the burden of establishing a causal relationship by the weight of the medical evidence nor does it shift the burden of proof to the Office to disprove an employment relationship.⁵

ANALYSIS -- ISSUE 1

In this case, the Office accepted that appellant sustained a contusion to the face or scalp from blunt trauma on December 4, 1984. Appellant claims that her seizure disorder arose as a result of the December 4, 1984 employment injury. However, the medical evidence is insufficient to establish that the employment incident on December 4, 1984 caused a seizure disorder.

Appellant submitted records from Dr. Leahy which detail appellant's history of head injury and subsequent treatment. His report of April 11, 1994 noted a history of appellant's work-related injury and noted that appellant had not had a seizure in six months and her physical examination was normal. Although the physician provided a detailed history of the work injury and established that appellant suffered from a seizure disorder, Dr. Leahy did not provide a rationalized opinion regarding the relationship between appellant's injury on December 4, 1984 and her subsequent seizure condition. His report references a computerized tomography scan and an electroencephalogram but he did not indicate what the tests revealed regarding appellant's condition and the possible relationship to her seizures.⁶ Therefore, these reports are insufficient to meet appellant's burden of proof.⁷

Also submitted were reports from Dr. Potolicchio dated 1994 to 2000. Although these reports included a detailed history of injury, none of the reports provided a rationalized opinion regarding the causal relationship between appellant's diagnosed seizure disorder and the work incident of December 4, 1984. Dr. Potolicchio's reports of July 15 and 20, 1997 noted that appellant developed seizures after a minor head trauma at work 12 years ago and experienced her first seizure the night of her injury and diagnosed complex partial seizures. The physician noted in reports dated June 7 and September 3, 2002 that appellant sustained an injury at work in December 1984 involving head trauma and thereafter developed post-traumatic epilepsy. Dr. Potolicchio indicated that the onset of seizures occurred immediately following her head trauma in 1984 and she experienced no seizure prior to this event. The physician appeared to relate appellant's current seizure condition to the employment injury; however, his only rationale for doing so was that appellant experienced no seizure prior to the employment injury of December 4, 1984. The Board has held that an opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury is insufficient, without supporting rationale, to establish a causal relationship.⁸

⁵ *Judith J. Montage*, 48 ECAB 292, 294-95 (1997).

⁶ *Id.*

⁷ *See Jimmie H. Duckett*, 52 ECAB 332 (2001).

⁸ *Kimper Lee*, 45 ECAB 565 (1994).

Other reports from Dr. Caputy, including an operative report dated November 21, 1997 and a January 16, 1998 discharge summary, noted that appellant was admitted to the hospital with a history of intractable seizure disorder for the past 13 years. He indicated that appellant associated her condition with a head trauma in 1984, where she struck her head on a shelf. However, the doctor appears merely to be repeating the history of injury as reported by appellant without providing his own opinion regarding whether appellant's work-related injury was causally related to her seizure disorder. To the extent that Dr. Caputy is providing his own opinion, he does not provide any reasoning or rationale explaining why appellant's current seizure condition was caused by the December 4, 1984 employment injury. Additionally, the doctor's opinion was speculative with regard to causal relationship noting that "questions remain as to whether or not these two incidences are related."⁹

Other reports from Dr. Schissler dated April 28, 1999 and Dr. Lesser dated October 16, 1997 noted treating appellant following a head injury at work and diagnosed complex partial seizures. However, neither of the doctors provided a rationalized medical opinion regarding the causal relationship of the seizure disorder to the December 4, 1984 work-related injury and medical reports that do not contain such opinion are insufficient to meet appellant's burden of proof.¹⁰

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act, the Office has the discretion to reopen a case for review on the merits.¹¹ Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.¹² Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹³

ANALYSIS -- ISSUE 2

Appellant's October 4, 2002 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office.

⁹ *Frank Luis Rembisz*, 52 ECAB 147 (2000) (medical opinions based on an incomplete history or which are speculative or equivocal in character have little probative value).

¹⁰ See *Michael E. Smith*, 50 ECAB 313 (1999).

¹¹ 5 U.S.C. § 8128(a).

¹² 20 C.F.R. § 10.606(b)(2)(1999).

¹³ 20 C.F.R. § 10.608(b) (1999).

Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second requirements under section 10.606(b)(2). With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant submitted a December 9, 1985 medical report from Dr. Leahy, who provided a history of injury noting that appellant experienced a seizure several hours after she struck her head while at work. However, he also noted that the injury was not severe and opined that there was a possibility that appellant developed idiopathic seizures versus post-traumatic seizures. This information is cumulative of information already in the record and previously considered by the Office. Specifically, Dr. Leahy's report dated April 11, 1994 likewise detailed a history of appellant's head injury and subsequent treatment for her condition. Appellant's letter of November 8, 2002 noted that Dr. Leahy was unable to confirm that her epilepsy was the result of the head trauma in 1984; however, she indicated that Dr. Potolicchio reported that 15 percent of the damaged tissue on the right rear side of her brain required removal due to the traumatic head injury of December 4, 1984. This information is duplicative of other statements submitted by appellant and previously considered by the Office. The Board, therefore, finds that the Office properly determined that appellant is not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied her October 4, 2002 request for reconsideration.

CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish that her seizure disorder was caused by the December 4, 1984 employment incident and that the Office properly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the January 22, 2003 and October 1, 2002 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 30, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member